IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 01/10/2002

Coram

The Honourable Mr. Justice V.S. SIRPURKAR
and
The Honourable Mr. Justice F.M. IBRAHIM KALIFULLA

W.P. No.4320 of 2002 and W.P.No. 4321 of 2002

1. Adani Exports Limited
rep. by its Director
Ahmedabad 380 008
Regd. Office at Adani House

2. Rajesh S. Adani
Director & Shareholder
of Petitioner No.1
Adani House :: Petitioners in
Navrangpura W.P.No.4320 of 02

Inter Continental (India)
a Partnership Firm under
Indian Partnership Act and
having its Registered Office
at Shikar, Navrangpura :: Petitioner in
Ahmedabad W.P.No.4321 of 02

-Vs-

1. Union of India through Secretary
Ministry of Commerce
Udyog Bhavan
New Delhi 110 001

2. The Director General of
Foreign Trade,
Udyog Bhavan,
New Delhi

3. The Additional Director General
of Foreign Trade,
Udyog Bhavan
New Delhi

4. The Joint Director of General
of Foreign Trade

197 Whites Road
Chennai 600 014

5. The Designated Authority
197 Peters Road :: Respondents in
Chennai 600 014 both the W.Ps

Petitions under Art.226 of the Constitution of India
praying for a Writ of Mandamus as stated in
the petitions

For Petitioners :: Mr. P. Chidambaram
Senior Counsel for
M/s. P.S. Raman &
P.R. Raman

For Respondents :: Mr. V.T. Gopalan,
Addl. Solicitor General
assisted by
Mr. Gajendran

:ORDER

V.S. SIRPURKAR, J.
This judgment shall govern and dispose of two writ petitions, which were initially filed in the Gujarat High Court and originally registered as Special Civil Application Nos.3282 and 3279 of 1989. While Spl.C.A. No.3282 of 1989 was filed by Adani Exports Limited, Spl.C.A. No.3279 of 1989 was filed by one Inter Continental (India), a partnership firm.
2. Both these Special Civil Appeals as they were filed before the Gujarat High Court were allowed by the High Court by a common judgment dated 3-4-2000 and 17-2-2000. This judgment was challenged before the Apex Court by the Union of India, respondents herein vide Civil Appeal Nos.6320 and 6321 of 2000. The Apex Court allowed these appeals only on the ground of 'territorial jurisdiction'. Following is the operative part of the judgment:
"For the reasons stated above, these appeals succeed and the same are hereby allowed. The impugned judgment is set aside. We further direct that Special Civil Application Nos.3282/99 and 3279/99 filed by the respondents are hereby directed to be transferred to the High Court of Madras at Chennai forthwith and on receipt of the papers, we request the Chief Justice of the High Court of Madras to place them before an appropriate Bench for disposal in accordance with law. We are also of the opinion that since the parties have already undergone one round of litigation before the High Court at Ahmedabad and thereafter in these appeals before us, it is appropriate to request the High Court to dispose of these appeals as early as possible. The appeals are, accordingly, allowed."
In pursuance of the above direction, the matters were sent to this Court which were re-registered as W.P. Nos.4320 and 4321 of 2002 and have now been placed before us for disposal by the Hon'ble Chief Justice.

3. Though the controversy involved in these writ petitions is extremely narrow, the factual background is somewhat spread out. Fortunately, the factual background in both the writ petitions is practically identical and hence, we propose to dispose of these writ petitions by a common judgment as was done by the Gujarat High Court.

4. After seeing the pleadings of the parties in writ petitions and the counters filed on behalf of Union of India, the controversy revolves around only one question, viz.:
"Whether the petitioners are entitled to avail credit of the customs duties under the 'passbook' scheme on the basis of the import contents of exports already made based on Standard Input/Output Norms, referred to as 'SION' hereafter, prevailing upto 31-3-1997 or whether such credit would be governed by the subsequent SION applicable to the parties starting from 1-4-1997 which are in respect of other duty exemption schemes other than the passbook scheme?"
The question may still be compressed further to the effect:
"whether the petitioners are entitled to the credit of customs duties in respect of Vitamin Mixes and Mineral Mixes at the rate of 227 Kg. for every metric ton of headless/head-on shrimps already exported by them as per SION prevailing in between 1st April 1992 and 31st March 1997 or the same should be restricted to only 27 Kgs. as per SION for the period beginning from 1st April 1997?"

A still third question on the basis of the arguments raised before us by the learned Additional Solicitor General is to the effect as to:
"Whether without proving the actual prior imports of Vitamin Mixes and Mineral Mixes can the petitioners claim the credit of customs duties at all on the basis of their exports of head-on/headless shrimps?"

5. For appreciating the controversies involved, the following undisputed factual details would be essential:
5.1 Both the petitioners are exporters and enjoying the status of 'Super Star Trading House' in the State of Gujarat on account of their quantum of exports. They are major foreign exchange earners.
5.2 Union of India and the other respondents, under the powers conferred upon them by the provisions of Foreign Trade (Development and Regulation) Act, 1992 (in short 'the Act') and more particularly by Sec.5 thereof announced Export and Import Policy (in short 'the EXIM Policy') for the period between April 1992 and March 1997. This policy was obviously for the purposes of giving fillip to the exporters and thereby earn more foreign exchange for the country. Under Chapter VII of the EXIM Policy, a Duty Exemption Scheme was framed.
5.3.1. Paragraph 48 of the said scheme speaks about 'Advance Licence' and describes it to be a licence granted for import of inputs without payment of basic customs duty. It further provides that such licence shall be subject to the fulfilment of a time-bound export obligation and value addition as would be specified. Such advance licences are either value-based or quantity-based. In short, under this advance licence the goods could be imported with the obligation to use those goods or the value thereof for the purpose of exports. These licences were specific and while in case of a

value-based advance licence, it specified the names and description of items to be imported and exported, the CIF value of imports, and the FOB value and quantity of exports and in case of quantity-based advance licence, it specified the names and description of items to be imported and exported, the quantity of each item to be imported or, if the quantity cannot be indicated, the value thereof, the CIF value of imports and the FOB value and quantity of exports.

5.3.2. Vide Paragraph 51 standard norms for input-output and value addition were provided for in case of both value-based and quantitybased advance licences. Paragraph 51 reads as under:

"Input-Output and value addition norms.- The standard input-output norms for the imports and exports for the grant of both value based and quantity based advance licences and value addition norms for value based licences shall be in accordance with the norms published by the Director General of Foreign Trade in the Handbook of Procedures (Vol.2). However, in respect of quantity based Advance Licences for which such standard input-output norms have not been published, the quantitative norms will be as specified by the competent authority."

5.3.3. The most important part for this decision is paragraph 54 which speaks of a pass book scheme. It runs as under:

"A Pass Book Scheme shall be available for some categories of exporters. A manufacturer-exporter or an exporter granted an Export House/ Trading House/Star Trading House/Super Star Trading House certificate, shall be eligible to avail the benefits of the Pass Book scheme. He may apply to the designated authority in the prescribed form for issue of the Pass Book. The designated authority may, after considering such matters as may be specified, issue a Pass Book to the applicant.

The Pass Book Scheme shall apply only for the export of products where standard input/output norms have been published. The Director General of Foreign Trade shall appoint a designated authority, being an officer of the rank not less than a Deputy Director General in each of the Customs Houses at Delhi, Bombay, Calcutta and Madras and such other Customs Houses as may be specified by him in this behalf. The designated authority shall be the competent authority in respect of matters concerning the Pass Book Scheme and shall discharge his functions under the overall direction and supervision of the Collector of Customs.

Upon the export of goods by a Pass Book holder, the designated authority shall calculate, on the basis of the standard input/output norms, the import content of the said exports and determine the basic customs duty payable on such imports. He shall credit the said amount in the Pass Book.

Upon imports being made by the Pass Book holder, the credits may be utilised to pay the basic and additional customs duties on the imported goods. Payment shall be by a debit entry to be made in the Pass Book by the designated authority. The export goods shall not be eligible for drawback on the inputs for which credit in the Pass Book is taken. The import and export shall be made through the same port. Any goods which are not included in the Negative List of Imports or in the list of Sensitive Items may be imported under this scheme. The Pass Book shall be valid for a period of two years from the date of issue and may be renewed from time to time." (emphasis supplied)

5.3.4. The standard input-output norms (SION) would be necessary to

be seen for the present controversy. The norm regarding the fish products and more particularly Entry 7 therein would be relevant for our purpose. The relevant entry regarding export item and import item is re-produced hereunder:
I.O. Norms FISH PRODUCTS

Sl. Export Item Import Item Value
No. Name Qty. Name Quantity

Allowed Addition% Remarks

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1. Not Relevant
2. Not Relevant
3. Not Relevant
4. Not Relevant
5. Not Relevant
6. Not Relevant
7. Frozen Head-on/Headless
Shrimps 1 MT Prawn Feed comprising of: 125

a) Fish Meal) 1.65
) (cumulative)
b) Shrimp Shell Meal)

c) Soya Meal
d) Fish Oils/ 1.20 MT
Oil Mixes (cumulative)

e) Fish Soluble/ (None of these
Liquid Fish Meal items should
exceed 0.25 MT)

f) Squid Liver Powder
g) Squid Liver Oil
h) Wheat Gluten
i) Lecithin (Soya
bean)

j) Vitamin Mixes) 0.227 MT
consisting of)
Vitamin C,)
Vitamin E,)
Vitamin A/AD3,)
Vitamin B2/B6)
)
k) Mineral Mixes)

Note:- 1. The above inputs shall be allowed only to the exporters having aqua culture and are growing the shrimps etc. in their own ponds on the certification of MPEDA.
2. All prawn feed ingredients mentioned at (a) to (k) above shall be specified as veterinary grade.

The petitioner claimed to have exported Head-on/Headless Shrimps and, therefore, claim credit on the custom duty for vitamin mixes consisting of vitamins at the rate of 227 kilos (0.227 MT) every metric ton of exports as per these norms.
5.3.5. Relevant parts of paragraph 114 of Chapter VII in the Handbook of Procedures, Volume 1, for the period commencing from 1st April, 1992 to 31st March, 1997, incorporating the amendments made upto 30 th April, 1995, provide as under:
"... ... ... The Pass Book holder should specify in the export documents including the shipping bill that the export is under the Pass Book Scheme in terms of paragraph 54 of the Policy. Based on the standard input output and value addition norms (referred to in paragraphs 5 1 and 60 of the Policy), the Designated Authority will determine the basic customs duty deemed to have been paid by such an exporter and the said amount will be credited in the Pass Book. The exporter can utilise the credit so given for import of permissible items. The Pass Book will be valid for a period of two years from the date of issue. However, any credit in the Pass Book at the end of the period of two years may be utilised within a period of 12 months thereafter and any unutilised credit at the end of the period of three years shall lapse.
... ... After determining the applicable customs duties on such imports, clearance of imports will be permitted and the customs duties so arrived at will be debited in the Pass Book by the Designated Authority. ...
... ... The exports and imports and the debit and credit entries will be permitted only to the holders of the Pass Book. However, the Pass Book holder is free to sell the goods so imported. ... ..."
(emphasis supplied)
5.3.6. Paragraph 54 of the Policy and more particularly the last part underwent a slight change which can be appreciated by the emphasis supplied. For the sake of convenience, the relevant changes are highlighted as they are heavily relied upon by the petitioners:

"Pass Book Scheme - ... ...
Upon the export of goods by a Pass Book holder, the designated authority shall calculate, on the basis of the standard input/output norms, including packing material as provided in General Note for Packing Material in the Handbook of Procedures (Vol.2), the deemed import content of the said exports and determine the basic customs duty payable on such deemed imports. He shall credit the said amount in the Pass Book. Upon imports being made by the Pass Book holder, the credits may be utilised to pay the basic customs duty on the imported goods. Payment shall be by a debit entry to be made in the Pass Book by the designated authority. In respect of additional customs duty the Pass Book holder will have an option to pay the same either by debit

entry to be made in the Pass Book or in cash. The export goods shall not be eligible for drawback on the inputs for which credit in the Pass Book is taken. The import and export shall be made through the same port. Any goods which are not included in the Negative List of Imports may be imported under this scheme. Besides credit available under the Pass Book may also be utilised to pay customs duty while importing goods permitted against freely transferable Special Import Licences. The Pass Book shall be valid for a period of two years from the date of issue and may be renewed from time to time.
(emphasis ours)
This amended scheme came into effect from 25th March, 1996. However, Entry 7 of the SION remained as it is. Petitioners' claim is based on the unamended Entry 7 of SION as also on the unamended and the amended paragraph 54 pertaining to the Pass Book Scheme.

6. It is an admitted position that both the petitioners are availing of the Pass Book Scheme and had claimed that they had exported frozen Head-on/Headless Shrimps, covered under Entry 7 of SION entries (please refer to paragraph 5.3.4. for the entry). There is no dispute that these exports were made during the period of two years covered in the Pass Book Scheme. They, therefore, sought a credit commensurate to their exports of frozen Head-on/Headless Shrimps. The claim was that they should be given the credit for the item covered in entry (j) in the Import Items, viz. Vitamin Mixes at the rate of 227 kilos per metric ton. In short, petitioners claim that for every metric ton of the export made, they should be given the credit of the customs duty payable on 227 kilos of Vitamin Mixes. They claimed the rate of U.S.$36 per kilo. However, the customs authorities proposed that the credit should be granted by the respondents at the rate of U.S.$8 per kilo for Vitamin Mixes. It is significant to see here, at this stage there was no dispute regarding the quantity of 227 kilos for every metric ton of export. The dispute was only as regards the rate which, according to the petitioner, was U.S.$36 per kilo while according to the respondents, it was only U.S.$8 per kilo. An order to that effect was passed by the first respondent and the petitioners filed appeals before the Commissioner of Customs (Appeals) who allowed the appeals and accepted the petitioners' claim for the credit at the rate of U.S.$36 per kilo. The matter was carried by the Department by way of appeal to the Customs, Excise and Gold (Control) Appellate Tribunal (in short 'CEGAT') who ultimately passed the final orders and confirmed the order passed by the Commissioner of Customs (Appeals) holding that the rate claimed by the petitioners of U.S.$36 per kilo was the proper rate. It is reported that the orders passed in case of both the petitioners are challenged before the Apex Court in the Special Leave Petitions filed by the Department.

7. It is an admitted position again that during the pendency of the matters before the Commissioner of Customs (Appeals), the petitioners were granted the credit at the rate of 227 kilos of Vitamin Mixes for every metric ton of export. After the order was passed by the Commissioner of Customs (Appeals), during the pendency of the matter before the CEGAT, the Tribunal had rejected the stay application in respect of both the petitioners filed by the department and the credit was given to the petitioner in their Pass Book at the rate of 227 kilos per metric ton of export on the higher

value, i.e. at the rate of U.S.$36 per kilo as per the claim of the petitioners. The petitioners, for that purpose, had also furnished bank guarantees for the 10% of the total credit amount and had also executed bonds for the full value of the credit amounts. The order of the CEGAT came to be passed on 22-12-1998.

8. Petitioners claim that after the orders by the CEGAT, petitioners once again approached the respondents for giving credit finally in their Pass Books in terms of their claim for the balance exports but, despite repeated requests and reminders, respondents failed to extend the credit to the petitioners. Petitioners have filed copies of the representations made by them in the month of April, 1999 which have been marked as Ex.E-1 and Ex.E-2 in both the petitions. However, petitioners came to know that the credit had been withheld on the instructions received by respondents 2 and 3. Petitioners also point out that though the Pass Book Scheme was discontinued by the Central Government, with effect from 1-4-1997, the Central Government from time to time kept on extending the period for availing the credit and for utilising the same on the basis of the earlier exports made during the period of two years when the Pass Book Scheme was in vogue. However, the respondents denied that credit to the petitioners, necessitating the filing of the petitions by the petitioners.

9. It seems that the stand taken by the respondents was that from 1-4-1997, new SION came into effect wherein the entry regarding the Vitamin Mixes which hitherto was a consolidated entry permitting the import of Vitamin Mixes/Mineral Mixes to the extent of 0.227 MT/MT was bifurcated and the permissible quantity under the new SION was Vitamin Mixes 0.027 MT and Mineral Mixes 0.200 MT. It seems that vide letter No.3/36/97-98/P&I dated 25-5-1998, the customs authorities were advised not to allow the clearance of Vitamin Mixes beyond the quantity of 27 kilos per metric ton of export. A stand was, therefore, taken regarding the claims of the petitioners that in respect of the advance licences issued prior to 1-4-1997 also, the new SION should be made applicable meaning thereby that for the import of Vitamin Mixes, credit should be given only at the rate of 27 kilos for every metric ton of export of frozen Head-on/Headless Shrimps. Needless to mention that similar was the stand taken by the respondents before the Gujarat High Court. It was suggested, more particularly in paragraph 6 of their reply affidavit, that 0.227 MT/MT of export product was the combined quantity allowed for Vitamin Mixes and Mineral Mixes. However, taking advantage of this grouping of quantities, some of the exporters/importers started claiming the duty free import/pass book credit benefit for the entire quantity of Vitamin Mixes and in order to prevent such practice, the standard input/output norms were subsequently revised/rectified with effect from 1-4-1997 allowing 0.027 Mts of Vitamin Mixes consisting of various Vitamin and 0.200 Mts of Mineral Mixes subject to the conditions imposed in the note below the revised SION. In paragraph 12 of the reply-affidavit, it was stated that the Court be pleased to direct the petitioners to restrict their claim for Vitamin Mixes at the rate of 27 Kg/MT only, which the respondents were ready to consider and settle the pending claims of credit. At this juncture, it will be better to see the relevant entry of the revised SION with effect from 1-4-1997, which reads as follows:

Duty Exemption Scheme I. O. Norms FISH PRODUCTS

Sl. Export Item Import Item Value
No. Name Qty. Name Quantity

Allowed Addition% Remarks

D1 Not Relevant
D2 Not Relevant
D3 Frozen Headon/Headless 1 MT Prawn Feed ingredients
Shrimps of species Black
Tiger (Penaeus Monodon) a) Fish Meal) 1.65 MT
and White Shrimps b) Shrimp Shell Meal) (cumulative)
(Penaeus Indicus)
c) Soya Meal) 1.20 MT
d) Fish Oils Oil Mixes) (cumulative)
e) Fish Solubles/Liquid Fish) None of these
Meal) items should
) exceed 0.25 MT
f) Squid Liver Powder)
g) Squid Liver Oil)
h) Wheat Gluton)
i) Lecithin (Soya Bean))

j) Vitamin Mixes consisting) 0.27 MT
of Vitamin C, Vitamin E,)
Vitamin A/AD3, Vitamin B-1)
HCL/B-1, Mono Nitrate)
Vitamin B2/B6)

k) Mineral Mixes) 0.200 MT

Note: The feed ingredients - Vitamin Mixes and Mineral Mixes allowed above are to be permitted only in mixed form and not as individual vitamins/minerals.

When compared with entry (j) appearing in paragraph 5.3.4 of this judgment, the change becomes significant. In the earlier norms, there was nothing limiting the imports only to the Vitamin Mixes or only the Mineral Mixes. The quantity up to 0.227 kilos per metric ton could be imported in any proportion or even individually. The restriction was only the limit of 227 kilos per metric ton. When we see the amended entry (j), it becomes apparent that under the same now if the Vitamin Mixes are to be imported as against the exports that will be restricted only to 27 kilos per metric ton as against the export of 1 metric ton of frozen Head-on/Headless Shrimps. Similarly, the Mineral

Mixes would be subject to the extent of 200 kilos per metric ton. The respondents insist and took a stand before the Gujarat High Court that it would be these amended norms which would be applicable even in respect of the exports which were made during the period of two years from 1-4-1995 to 31-3-1997. In short, the contention is that the petitioners if they want to claim the credit on the basis of Vitamin Mixes, it would be only to the extent of only 27 kilos as against the export of 1 metric ton of frozen Head-on/Headless Shrimps. It is on this issue that the parties are at loggerheads.

10. Learned senior counsel, Mr. P. Chidambaram, appearing on behalf of the petitioners firstly took us through the whole gamut of the EXIM Policy and pointed out the basic differences in the Advance Licence Scheme and the Pass Book Scheme. The argument is that the whole idea behind this policy was to boost the exports so as to earn more foreign exchange for the country. He pointed out that the Pass Book Scheme was in vogue only for a definite period of two years, commencing from the date of issue of the Pass Book. The learned counsel also points out that the SION were prescribed by the Central Government firstly and mainly for the Advance Licence Scheme and were later on made applicable even to the Pass Book Scheme. According to the learned counsel, the Pass Book Scheme was nothing but a further extension of the Advance Licence Scheme under which the restrictions and liabilities under the Advance Licence Scheme were done away with.

11. The learned counsel heavily relies on the language of the Pass Book Scheme and points out that the exporters could get the credit on the fact of export by itself when such export was proved before the designated authority who was the Director General of Foreign Trade. According to the learned counsel, the basic difference in the Advance Licence Scheme and the Pass Book Scheme was that under the later there was no necessity of the nexus between the exports and the imports either prior to or after the exports. The exports when once proved, the necessary credit had to be given, the calculation of which was to be in accordance with SION. In short, the credit under the Pass Book Scheme did not depend upon the prior imports or the subsequent imports as the concept of import was completely done away with and the credit had to be calculated only on the notional imports which the exporters could have been entitled to under the SION. The learned counsel points out that to take the example if 1 MT of frozen Headless/ Head-on Shrimps were exported, it was not necessary that the exporter would be liable to import the Vitamin Mixes in the quantity as per SION. The learned counsel is at pains to point out that the credit had to be given only on the notional import as for example on an export of 1 MT of frozen Head-on/Headless Shrimps, the exporter would be entitled for a credit of the customs duty which he would have otherwise paid had he imported 227 kilos of Vitamin Mixes and Mineral Mixes. The learned counsel says that there would be no question of prior imports or even the subsequent imports as on the basis of the credit given the exporter could import any other goods, of course, with the exception of the goods included in the Negative List of Imports or in the list of Sensitive Items. The following sentence in the Pass Book Scheme is very heavily relied upon by the learned senior counsel, that being:
"Any goods which are not included in the Negative List of Imports or in the

list of Sensitive Items may be imported under this scheme." (emphasis given) The argument, therefore, is that the SION is only meant for the calculation and there would be no necessity of importing the goods included in SION only. The learned counsel, therefore, asserts that in the wake of proved exports by the petitioners, they were entitled to the matching credits in accordance with SION.

12. It is further pointed out that initially this was accepted by the respondents which would be clear from their reply-affidavit. The only dispute raised by the Department in this case was regarding the rate at which the credit was to be calculated, i.e. whether it was U.S.$36 per kilo or U.S.$8 per kilo. He further points out that even before the matter went to CEGAT, the controversy did not pertain to the right of the petitioners to have the credit on the basis of SION as it existed during the two years' period of the Pass Book Scheme. He points out that the Pass Book in this case was issued on 24-11-1995 and would, therefore, in vogue for two years thereafter. The learned counsel is at pains to point out that even regarding the import entry in the SION, there was no difficulty or confusion or controversy or dispute inasmuch as the authorities then rightly concluded that under entry (j) the petitioners would have a credit for their exports of frozen Head-on/Headless Shrimps at the rate of 227 kilos of either Vitamin Mixes or Mineral Mixes or both. Thus it was an uncontroverted position regarding the quantity. The only controversy in the beginning was in respect of the rate of the Vitamin Mixes but it certainly did not pertain to the quantity thereof or the proportion thereof. He also points out that the entry regarding the Vitamin Mixes or the Mineral Mixes was in the common bracket and as such the authorities had rightly acknowledged the right of the petitioners to have the credit on the basis of only the Vitamin Mixes because under that entry, an exporter could have been perfectly justified in insisting upon a credit on the basis of the notional import of only the Vitamin Mixes or only the Mineral Mixes or the combination of both in any proportion.

13. The learned senior counsel then points out that this SION entry underwent a change only with effect from 1-4-1997 when entry (j) was bifurcated and the import of Vitamin Mixes was restricted to 27 kilos per metric ton while in respect of the Mineral Mixes, they were restricted to 200 kilos per metric ton. Thus, an exporter could not combine the imports in respect of Vitamin Mixes and the Mineral Mixes. According to the learned senior counsel in the original entry, there was no restriction on these two items being imported individually or in any combination. However, that was changed with effect from 1-4-1997. The learned counsel fairly admitted that if that entry of SION governed even the earlier Pass Book period, then the petitioners would have no case. However, according to the learned counsel that could not be, as firstly there was nothing in the new scheme to suggest that the subsequent SION was restrictive in nature and would thus apply to the earlier period also. The argument is that there is no hiatus between the factum of export and the entitlement of the credit based thereupon and, therefore, as soon as the exports were made during the currency of the Pass Book Scheme, the credits on the notional imports as per the SION had become due as a matter of right.

14. As against this the learned Additional Solicitor General, Mr. V.T. Gopalan, appearing on behalf of the respondents tried to suggest that the Pass Book Scheme being in the nature of a concession only, there was no question of any fundamental or vested right in the petitioners to claim the credit of customs duties. It was clarified that there was nothing to suggest any proportion between the Vitamin Mixes and the Mineral Mixes as per the old SION entries as they were bracketed together. The learned counsel suggests that their being bracketed together would mean that the imported content had the combination of both the Vitamin Mixes and Mineral Mixes. The learned counsel further suggests that since there was no specified division, it become necessary particularly in view of the fact that the Mineral Mixes (?) became non-dutiable. He justified his argument by suggesting that the authorities have taken a correct view on the basis of the subsequent entry of SION. In support of his argument, the learned Solicitor General heavily relied on the decision of the Supreme Court, reported in 1996 2 SCC 439 (International Limited and others v. Assistant Director General of Foreign Trade and others).

15. Indeed, if it is held that it is the subsequent SION entry which would be applicable to the exports made by the petitioners, there would be no question of any further consideration of their claim. Therefore, it would be our endeavour to see first as to whether the subsequent SION entry, dated 1-4-1997, would be applicable to the exports made in the period when the Pass Books of the petitioners were in vogue. We would, therefore, critically examine the language of EXIM Policy, which was published by the Government of India for the period between 1-4-1997 and 31-3-2002. The first striking factor which can be seen is the absence of the Pass Book Scheme.

16. In the new Policy, indeed, there does not appear to be any reference to the Pass Book Scheme under Chapter VII which provides the Duty Exemption Scheme. Under the new scheme, an application can be made for grant of a duty free licence. Under para 7.4, it is provided that where the Standard Input-Output Norms (SION) have been published, an application could be given in the prescribed form vide Appendix-IIB with the documents. A cursory glance of the whole paragraph 7 would suggest that there is no such Pass Book Scheme as was available in the earlier EXIM Policy. In the Handbook of Procedures, Vol.2, for the period April 1997 - March 2002, under the SION for Fish Products, an entry (D3) is found for Frozen Head-on/Headless Shrimps of species Black Tiger and White Shrimps. We have already quoted the new entry in the earlier part of our judgment. We, however, find nothing in the language of the norms or the new policy to suggest that the new SION which have been provided in pursuance of the subsequent policy (post-1997 policy) could govern even the earlier exports. The language of the new policy is definitely futuristic and there is nothing to suggest therein that the norms provided or framed thereunder would affect the rights earned under the old policy in accordance with the old norms.

17. In the language of para 54, which pertains to the Pass Book Scheme, there is a clear-cut indication to suggest that the credit should be calculated on the basis of the exports made and the calculation would be in terms of the SION. We will have to necessarily infer that the credits could

have been calculated only on the basis of the norms as they were existing on the date of exports. A correct reading of paragraph 54 and more particularly the third part thereof would suggest that there is no hiatus in between the exports and the consequent or the resultant entitlement of the credits. It is unthinkable that on the basis of the exports, the authorities could be allowed to wait for the period to end the existing policy and then to calculate the credit in the light of the new norms particularly when in the new policy there is no scope or mention or reference to the Pass Book Scheme at all. If the Pass Book Scheme was conspicuously absent in the new policy, one fails to understand as to how the authorities could be allowed to calculate the credits payable to the exporter under a non-existent Pass Book Scheme. Therefore, on the basis of the language at least there does not appear to be any scope to hold that the subsequent norms could govern even the earlier exports.

18. In this behalf, it will have to be noted that the norms were initially framed for the purposes of Advance Licence Scheme and they were only extended to the temporary Pass Book Scheme which was to remain in force for two years. There are essential differences between the Advance Licence Scheme and Pass Book Scheme. While under the Advance Licence Scheme, there is a definite nexus to be found between the exports and the imports. The Pass Book Scheme totally does away with the concept of matching imports. As has been seen earlier, the exporter, on the basis of the exports, gets the credit of the customs duty payable on the notional export. He does not have to import the items mentioned in the SION. The entries in the SION are only to be used for calculating the entitlement of the credit, which calculation depends on the factum of the exports alone and no other thing. That is the limited use of the entries in the SION for the purposes of the Pass Book Scheme. This is in sharp contradistinction with the Advance Licence Scheme under which there has to be a definite nexus between the exports and the imports. Once this distinction is realised between the Advance Licence Scheme and the Pass Book Scheme then the natural inference to flow from the same is that there would be no hiatus between the factum of export and the entitlement of the credit on that basis in terms of SION. In fact, during the pendency of the Pass Book Scheme, the credit would accrue to the exporter as soon as he exports because that is the import of the Pass Book Scheme. If that is so, all the imports which were made during the pendency of the Pass Book Scheme period would attract the credit as per the SION and essentially it would have to be the SION which was in prevalence at the time of export. It is very significant to note that at that time, the Pass Book Scheme was in prevalence and after 31-3-1997, there was no Pass Book Scheme at all. If, therefore, the whole Pass Book Scheme is absent conspicuously in the subsequent EXIM Policy, it will be difficult to connect the SION under the subsequent policy with the exports made under the old policy. It is, therefore, difficult to accept the contention raised by the learned Additional Solicitor General that the subsequent SION would decide the fate of the petitioners in this case.

19. In this behalf, it may still be further seen that in the Pass Book Scheme once the exports were made and the credits accrue and recorded by the competent authority in the pass book, on the basis of those

credits any goods could be imported and even be sold. We have deliberately quoted extensively para 54 of Chapter 7 of the Policy (see para 5.3.3. supra) under which,there is a clear reference that any goods not included in the Negative List of imports or in the list of Sensitive Items could be imported on the basis of that credit. It is further to be seen that the relevant paragraph 114 has also been quoted by us in para 5.3.5. of this judgment which would suggest that the goods so brought on the basis of the credits earned on the basis of the exports made could even be sold. All these would suggest the unique nature of the Pass Book Scheme and more particularly the fact that the scheme worked in praesenti. The language of these paragraphs, more particularly para 54 and para 114, which have been deliberately quoted by us, would give a complete idea that there was no necessity whatsoever for matching prior or subsequent imports or the exports. The emphasised portions by us in old para 54 of the Policy and para 1 14 of the Hand Book of Procedure, Vol.1 would leave us in no doubt that for working of the scheme and for giving the credits, there was no necessity whatsoever to wait for any eventuality to take place. The right of credit was immediate on the exports made. If an exporter could bring in whatsoever goods on the basis of the credits, there can be no question of seeing any nexus in the concepts of import and export and if there is no nexus or a liability to import either prior to the export or after it, it will have to be necessarily inferred that the entitlement of the credit was immediate on the export subject to, of course, calculations made by the compet ent authority on the basis of the norms then in existence. We do not see as to why the exporter had to wait for those credits. All these would further suggest that the subsequent policy, which did not provide for the facility of Pass Book Scheme, was totally alien to the working which was provided in the Pass Book Scheme.

20. We also do not find anything in the subsequent policy or the SION thereunder suggestive of any clarification as tried to be contended before us. If there was any intent to clarify, it could have been done separately and independently also or even in the new policy. Therefore, an argument that the entry in the SION was of a clarificatory nature and, therefore, would govern even the earlier exports cannot be countenanced particularly in view of the total absence of the Pass Book Scheme in the subsequent EXIM Policy or in the absence of any specific provision for such an explanation.

21. There are few decisions in which the Apex Court as well as the other High Courts have considered the question of the applicability of the norms. In S.B. International case, cited supra, it was observed by the Supreme Court as under:
"It is the date of licence that is relevant and not the date of application therefor. The norm (value addition norm) in vogue on the date of grant of licence shall govern the licence. The mere fact that the authorities have a discretion to take into account the exports made after the date of application for advance licences makes no difference to this position."
That was a case where the exporter was claiming the relief on the basis of the norms which were applicable on the date of the filing of applications for Advance Licence whereas, the Department's view was that the norms which were applicable on the date of the licence could alone be relied upon by the

exporter. That was also a case where the norms were changed to the detriment of the exporter and perhaps because of that it was claimed that the changed norms were not applicable. The Supreme Court held as quoted above and the observations would go to show that the norms which were there on the date of licence were alone to be considered. They being the changed norms in the facts of that case, the Supreme Court held that the amended norms would be applicable. In fact, this case was relied upon by the learned Additional Solicitor General to suggest that if the norms are changed, the revised norms would be applicable. In fact, according to us, this decision should support the petitioners' case more than the department because of the observations made by the Supreme Court that the norms which were in force on the date of the licence would alone be applicable. In the present case also the same position is obtained inasmuch as during the pendency of the pass books issued to the petitioners, there were unamended norms, which were amended subsequently, and, therefore, it is clear that only the prevalent norms on the date of the issue of the passbooks would be applicable.

22. To the same effect is the judgment of the Bombay High Court reported in 1997 (68) ECR 796 (Sonia Fisheries and another v. Union of India and others). There, the Division Bench of the Bombay High Court was considering the question of the liability of the exporters who had availed of the Advance Licence facility to import. It was the case of the petitioners that since the exporters were made in terms of the advance licences the petitioners were entitled for transferability as per the EXIM policy. An application to that effect was made for endorsing the licence. While considering the question, the Bombay High Court came to the conclusion that once the advance licences were given to the petitioners on the basis of the EXIM policy in force, it was apparent that they were on condition of fulfilling their export obligations. At that time, there was no SION published at all. The Division Bench, headed by M.B. Shah, C.J., as His Lordship then was, observed:

"It cannot be said by any stretch of imagination that the norms published on 20th January, 1995 would have retrospective effect so as to permit the authorities to cancel or modify the Advance Licence granted prior to the said date, that too in cases where the petitioners have fulfilled their export obligations. Paragraph 51 of the Export & Import Policy itself provides that where norms are not fixed the quantity norms will be as specified by the competent authority and in the present case the Competent Authority after considering the petitioners' application has granted Advance Licence in September, 1993. That licence could not be modified on the basis of the norms fixed on 20th January, 1995. This would be totally arbitrary action. That norms cannot have any retrospective effects so as to adversely affect the rights granted to the petitioners under Licence. The norms prescribed will take effect only from the date of its publication i.e., from 20 th January, 1995 and not from the earlier date."

The situation is no different in our case either. The pass books were issued to the petitioners on certain conditions as they appeared in the EXIM Policy, which we have quoted earlier. If that is so, then the entitlement of the petitioners to the credit earned on account of the exports made during the pendency of the pass books granted to them could not be set at naught by relying on the subsequent norms which came into effect only from 1-4-1997.

The Bombay High Court had also relied upon the aforementioned decision of S.B. International Limited case. We also respectfully agree with the learned Judges of the Bombay High Court and would choose to follow the same course as they did.

23. Once the finding regarding the applicability of the norms is in favour of the petitioners in the sense that once it is held that the subsequent norms could not be relied upon by the Department for setting at naught the credit claim of the petitioners, there would be really no necessity to proceed further in the matter. Learned senior counsel appearing on behalf of the petitioners also pointed out that in addition to this, the Department had admitted the case of the petitioners in respect of their quantity based entitlement at the rate of 227 kilos as against the export of 1 MT of frozen Head-on/Headless Shrimps. He also pointed out that in that the Department had read the entry correctly so as to give credit to the petitioners at that rate. However, the only question raised was regarding the price (value or the rate) of the Vitamin Mixes.

24. Learned senior counsel was at pains to take us through the records and to show that the bracketed entry (j) could only mean that the petitioners could claim on the basis of either the Vitamin Mixes or the Mineral Mixes or both or the combination of both in any proportions. We have dealt with this aspect earlier and we are repeating this because of the subsequent argument of the learned Additional Solicitor General who tried to suggest that because entry (j) is bracketed, it would have to be a combination of Vitamin Mixes and Mineral Mixes. We are not in a position to agree with the argument for the simple reason that entry (j) does not say anything. When we consider the earlier entries, there appear the words like 'cumulative', etc. in respect of some entries. In some others, there are specific quantity limitations provided. As for example, the word 'cumulative' appear in respect of entries (d) to (i) which are bracketed together. It is specified therein that the quantity entitlement in respect of the import items covered by entries (d) to (i) would be 1.20 MT (cumulative) as against the export of 1 MT of Frozen Head-on/Headless Shrimps. There is again a specific condition suggesting that none of these items [import items covered by entries (d) to (i)] should exceed 0.25 MT. Very significantly such conditions are not to be found in respect of the import items covered by entry (j) at all . Therefore, it is obvious that there could be any combination or even the individual import of these items subject to the quantity limitation of 227 kilos as against the export of 1 MT of Frozen Headon/Head-less Shrimps. There can be no other way in which the said entry can be read.

25. Learned Additional Solicitor General, however, raised an entirely new argument to the effect that even if we apply the old SION, on account of the language of paragraph 54 and more particularly because of the subsequent amendments, which came into effect from 25-3-1997 , the petitioners could not be entitled to any credit whatsoever. The learned counsel points out that the original paragraph 54 was amended during the pendency of the pass book scheme whereby some changes came to be made by adding the words "deemed imports" at some places. We have highlighted these amendments in para 5.3.6. supra. In paragraph 54 and more particularly the third part thereof, the

import was described as "deemed import" at two places. From this, the learned Additional Solicitor General suggests that since the pass books were issued prior to 25-3-1997 when the amendments came into effect, there will be no question of any concept of "deemed" or "notional imports" and in order to be entitled to the credit, there would have to be actual imports alone. In short, the contention is that the petitioners are not entitled to any credit whatsoever on the basis of their exports unless they prove to the satisfaction of the competent authority that they have actually imported the goods as per the SION meaning thereby that there will be no question of credits on the basis of notional imports.

26. As against this, the learned senior counsel, Mr. P. Chidambaram, contended that apart from the fact that such case is being pleaded for the first time, the import of the word 'deemed' was completely being misinterpreted. According to the learned counsel, even in the absence of the words 'deemed imports', there could be no change which would be apparent from the language of paragraph 54 of the Policy and paragraph 114 of the Handbook of Procedure, Vol.I

27. Indeed, the respondents, who had chosen to file a counter before the Gujarat High Court, chose to rely on the same before this Court also and did not add to the same by raising any additional grounds. When the counters in both the writ petitions are critically examined it is seen that no case was ever pleaded that the petitioners were not entitled to any credit unless the matching prior imports were proved to the satisfaction of the competent authority. On the other hand, it is clear from the counter that it was an admitted position that the SION for export of 1 MT of frozen Head-on/Headless Shrimps allowed the credit for the quantity of 0.227 MT of Vitamin Mixes and Mineral Mixes. We have already shown this from paragraph 6 of the counter. The only justification which was tried to be given in paragraph 6 of the counter was that the entry (j) provided for a combined quantity of Vitamin Mixes and Mineral Mixes. However, some of the exporters/importers started claiming the duty-free import/pass book credit benefit for the prior quantity of Vitamin Mixes and in order to prevent such practice, the SION were subsequently revised/rectified with effect from 1-4-1997 bifurcating the entry of Vitamin Mixes and Mineral Mixes and limiting their quantities to 27 kilos and 200 kilos respectively. It is further an admitted position that it was in pursuance of amended SION with effect from 1-4-1997 that the customs authorities were advised not to allow the clearance of Vitamin Mixes beyond a quantity of .27 MT of export in so far as it pertained to the Vitamin Mixes. Even if the whole counter is scanned, it will be seen that it is not at all pleaded that on the basis of unamended paragraph 54, there had to be matching prior import in order to be able to get the credit on the basis of exports and indeed it could not have been the stand for the simple reason that the concept of advance licence is entirely different from the concept of the pass book scheme though the pass book facility is in the nature of a further facility but which is independent of and de hors the Advance Licence Scheme. It will be seen that the language of paragraph 54 of the Policy and more particularly third part thereof is plain and unambiguous to suggest that on the basis of the export of goods by the pass-book holder, the designated authority has to calculate the basic customs duty payable on

the imports in the light of the SION and has to credit the said amount in the pass book. The subsequent sentence clarifies the position further, which is to the following effect:

"Upon imports being made by the Pass Book holder, the credits may be utilised to pay the basic and additional customs duties on the imported goods."

Now, if the idea was that of the matching prior imports such sentence would never have been there. The matters do not stop there but the further sentence clarifies the real scope of the pass book scheme. It is to the following effect:

"Any goods which are not included in the Negative List of Imports or in the list of Sensitive Items may be imported under this scheme."

This gives a direct blow to the argument of the learned Additional Solicitor General that the exporter has to first satisfy in relation to the prior import of the goods as per SION only. The goods to be imported need not be the goods which are mentioned in SION and under the scheme any goods can be so imported. Not only this, but, such goods can be sold also. This becomes clear from the language of paragraph 114 of Chamber VII of the Handbook of Procedure, vol.I. The relevant sentences read as under:

"The exports and imports and the debit and credit entries will be permitted only to the holders of the Pass Book. However, the Pass Book holder is free to sell the goods so imported."

Therefore, a position is obtained to the effect that the exporter, on the basis of his exports, is entitled to the credit of the duty which he would have been required to pay on the goods included in SION even when he has not actually imported those goods. The credit is on the basis of the notional import and the exporter gets the benefit of the credit of the customs duty and the quantity of which is also prescribed by SION. Probably, the idea of giving this benefit is to enable the exporters to quote competitive prices for their goods in the international market so that they can stand in the global market. Now when we see the unamended paragraph 114 of the Handbook of Procedure, Vol.I there a sentence is worth-noting. It reads as under:

"Based on the standard input output and value addition norms (referred to in paragraphs 51 and 60 of the Policy), the Designated Authority will determine the basic customs duty deemed to have been paid by such an exporter and the said amount will be credited in the Pass Book." (emphasis supplied)

There was in reality no necessity to use the word 'deemed' in relation to the customs duty if the scheme was as is being argued now by the learned Additional Solicitor General. The abovementioned sentence itself signifies that there was no necessity of the matching imports even under the unamended scheme. However, it was tried to be argued that we should not interpret the substantive policy on the basis of the language of paragraph 114 of the Handbook of Procedure, Vol.I because a procedural rule could not be used for the purpose of interpreting the provisions of the Act. There can be no dispute about this proposition but the sentence is being displayed only to show as to how the earlier policy, which in itself depended upon only notional imports, was to be worked in reality. Our attempt is to show that the user of the words 'deemed imports' in paragraph 114 of the Handbook of Procedure, Vol.I was a natural fallout of paragraph 54 of the Policy and not vice versa.

28. The learned Additional Solicitor General then suggested

that by amendment, the word ‘deemed’ came to be added in the Pass Book Scheme also, more particularly in the third part of paragraph 54. We have quoted the same paragraph in paragraph 5.3.6 of this judgment. From this, the learned Additional Solicitor General contends that at least from the date of the issue of the pass book, i.e. from 25-11-1995, up to 25-3-1996 the deeming provision was not available and, therefore, at least in so far as that period is concerned, the petitioners will have to prove the actual imports. In our opinion, the argument is wholly incorrect. It is therefore that we have shown that though the word ‘deemed’ before the word ‘import’ was absent in the unamended paragraph 54 of the Policy, the idea of ‘deemed’ payment of customs duty was very much present even in unamended paragraph 114 of Chapter VII of the Handbook of Procedure, Vol.I, which we have quoted above. Once the concept of notional duty or a deemed duty on the notional imports or deemed imports becomes available even from the unamended Pass Book Scheme, there would be no question of holding against the petitioners merely because the word ‘deemed’ came to be added before the word ‘imports’. Once the amended scheme is seen, which we have quoted in paragraph 5.3.6 supra, it is clear that the words were added merely by way of clarification because the basic idea of the notional imports was very much present even in the unamended scheme. That was only highlighted by the amendments. For these reasons, we are of the clear opinion that the argument is wholly incorrect and deserves to be rejected.

29. Though not argued before us specifically, we must take stock of the justification by the State on the ground that some of the exporters on the basis of their exports started importing only the Vitamin Mixes, which were free of any duty. That may be so. However, if the law permitted this, there would be no question of reading a retrospective effect of such corrective measures even if it can be called to be a corrective measure. Again, we cannot forget one fact that in this case, there was no necessity to actually import the Vitamin Mixes. All that was necessary was to calculate the duty on the Vitamin Mixes in the light of the SION. At any rate, the Government letters and more particularly, the letter dated 25-5-1998, addressed by Additional Director General of Foreign Trade to all Commissioners of Customs and all Regional Licencing authorities, is extremely clear. So also, the letter dated 21-1-1999, issued by the Government of India, Ministry of Commerce to all Customs authorities and Licencing authorities is also extremely clear. Following sentences in the letter display the true intent:
“with effect from 1-4-1997, the quantity of 0.227 MT/MT as referred to above was bifurcated into two parts, namely, (i) Vitamin Mixes = 0.027 MT/MT and (ii) Mineral Mixes = 0.200 MT/MT”
Therefore, the bifurcation even if introduced as a corrective measure was with effect from 1-4-1997. On this backdrop though the authorities were in a quandary about the real interpretation, which would be clear from the letter dated 15-12-1998, at page 64 of the compilation, it is clear to us that the bifurcation of the entry in SION could operate only prospectively.

30. From the overall correspondence and the documents, it seems that even the responsible officers of the Department were not certain about the implication of the Policy and were mixing up the Advance Licence

Scheme with the Pass Book Scheme. We have already shown that what was made applicable to Advance Licence Scheme (the nexus between the imports and the exports) was not applicable and could not be made applicable to the Pass Book Scheme which was entirely different and based on only the notional imports.

31. In view of all that has been stated above, it must be said that the writ petitions deserve to be allowed. In these cases, the pass books were issued on 25-11-1995 and through out the relevant period the petitioners were entitled to the credit on the basis of 227 kilos of Vitamin Mixes as against the export of 1 MT of frozen Head-on/ Head-less Shrimps as per the SION. The petitioners are claiming the credit of basic customs duty on the basis of the exports made up to 31-3 -1997 in respect of the Vitamin Mixes in accordance with the aforementioned SION. The petitioners would be entitled to the same.

32. It is pointed out at this juncture that by interim relief, the petitioners were granted some benefits and though initially some bills were calculated on the basis of 227 kilos at the rate of U.S.$8 per kilo, after the decision of the CEGAT few bills were corrected. The remaining bills, however, have not been corrected by the Department. The Department is

directed to pass appropriate orders in respect of the uncorrected bills and grant credit on the basis of 227 kilos of Vitamin Mixes as against the export of 1 MT of Head-on/Headless Shrimps.

33. The learned senior counsel for the petitioners pointed out that some time would be required to be given for exhausting the credit. In our opinion, a period of six months could be a reasonable period for utilising the credit. The period of six months shall start from the date of the orders passed by the Departm ent in the light of the directions given in this judgment. The Department shall also return the bond of Rs.80 crores and the bank guarantee ofRs.8 crores within a period of eight weeks from today.

34. Rule is made absolute in both the petitions in the above terms. However, under the circumstances, there shall be no orders as to the costs.

Index:Yes
Website:Yes
Jai
To:

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